

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436

FRESH TOMATOES FROM MEXICO

Inv. No. 731-TA-747

**NOTICE OF COMMISSION DETERMINATION TO DISMISS REQUEST FOR
INSTITUTION OF A SECTION 751(b) REVIEW INVESTIGATION**

AGENCY: U.S. International Trade Commission.

ACTION: Dismissal of a request to institute a section 751(b) review investigation concerning the suspension agreement in effect suspending investigation No. 731-TA-747: Fresh Tomatoes from Mexico.

SUMMARY: The Commission determines pursuant to section 751(b) of the Tariff Act of 1930 (the Act)¹ and Commission rule 207.45,² that the subject request does not show the existence of good cause or changed circumstances sufficient to warrant institution of an investigation to review the suspension agreement in effect suspending the Commission's investigation No. 731-TA-747: Fresh Tomatoes from Mexico. Pursuant to Commission rule 207.45(b),³ the Commission also determines that the request is not sufficient to warrant the publication of a notice in the *Federal Register* seeking comment on the request.

FOR FURTHER INFORMATION CONTACT: Michael Diehl, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202-205-3095. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-205-1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202-205-2000. General information concerning the Commission may also be obtained by accessing its Internet server (<http://www.usitc.gov>). The public record for this matter may be viewed on the Commission's electronic docket (EDIS) at <http://edis.usitc.gov>.

BACKGROUND INFORMATION: In May of 1996, the Commission made an affirmative preliminary determination in Fresh Tomatoes from Mexico, Inv. No. 731-TA-747 (Preliminary), USITC Pub. 2967. On October 29, 1996, the Department of Commerce (Commerce) entered into a suspension agreement with growers/exporters of fresh tomatoes from Mexico. As a result,

¹19 U.S.C. § 1675(b).

²19 C.F.R. § 207.45.

³19 C.F.R. § 207.45(b).

the Commission and Commerce suspended their investigations.⁴

On October 1, 2001, pursuant to section 751(c), Commerce initiated a five-year review of the suspension agreement, and the Commission instituted its five-year review.⁵ Before the reviews were completed, the Mexican parties withdrew from the suspension agreement, effective July 30, 2002.⁶ Commerce and the Commission terminated their five-year reviews and resumed their respective investigations, pursuant to 19 U.S.C. § 734(i).⁷ On December 4, 2002, before the resumed investigations were completed, Commerce and fresh tomato growers/exporters from Mexico entered into a new suspension agreement. Accordingly, pursuant to section 734(c), Commerce and the Commission again suspended their investigations.⁸

On February 10, 2003, the Commission received a request to institute a changed circumstances review of the suspension agreement currently in effect regarding imports of fresh tomatoes from Mexico. The request was filed by counsel for San Vicente Camalu, a producer of fresh tomatoes in Mexico, and for Expo Fresh, LLC, an importer of fresh tomatoes from Mexico (collectively, “SVC”).

ANALYSIS

In considering whether to institute a review investigation, the Commission must be persuaded that there is sufficient information available demonstrating:

- (1) that there are significant changed circumstances from those in existence at the time of the determination or suspension agreement for which review is sought;
- (2) that those changed circumstances are not the natural and direct result of the imposition of the antidumping duty order or suspension agreement; and
- (3) that the changed circumstances, allegedly indicating that revocation of the order or termination of the suspended investigation would not be likely to lead to the continuation

⁴61 *Fed. Reg.* 56618 (Nov. 1, 1996) (suspension of DOC investigation); 61 *Fed. Reg.* 58217, 58218 (Nov. 1, 1996) (suspension of ITC investigation).

⁵66 *Fed. Reg.* 49926 (DOC), 66 *Fed. Reg.* 49975 (ITC).

⁶67 *Fed. Reg.* 50858 (Aug. 6, 2002).

⁷67 *Fed. Reg.* 50858 (Aug. 6, 2002) (DOC), 67 *Fed. Reg.* 56854, 56855 (Sept. 5, 2002) (ITC).

⁸67 *Fed. Reg.* 77044 (Dec. 16, 2002) (DOC), 67 *Fed. Reg.* 78815 (Dec. 26, 2002) (ITC).

or recurrence of material injury to the domestic industry, warrant a full investigation.⁹

In general, changed circumstances warranting review are those relating to (1) the import pattern following imposition of an order and (2) market conditions.¹⁰

The Commission may not without good cause review a determination made under sections 705 or 735 of the Act, or suspension agreements made under sections 704 or 734 of the Act, less than 24 months after the date of publication of notice of that determination or suspension.¹¹ Good cause includes:

- (1) fraud or misfeasance in the proceeding for which review is sought;
- (2) acts of God, as exemplified where a severe freeze sharply reduced U.S. producers' shipments of frozen concentrated orange juice; and
- (3) a mistake of law or fact in the proceeding for which review is requested that renders that proceeding unfair.¹²

This list "is by no means exhaustive."¹³ However, "good cause will be found only in an unusual case" and "[w]hat constitutes good cause will necessarily depend on the facts of a particular case."¹⁴ The review at issue here was requested less than 24 months after the date on which notice of the suspension agreement was published.

⁹See generally Silicon Metal from Argentina, Brazil, and China, 63 Fed. Reg. 52289 (Sept. 30, 1998) (citing, *inter alia*, A. Hirsh, Inc. v. United States, 737 F. Supp. 1186 (Ct. Int'l Trade 1990)).

¹⁰A. Hirsh, Inc. v. United States, 729 F. Supp. 1360, 1363 (Ct. Int'l Trade 1990).

¹¹19 U.S.C. § 1675(b)(4).

¹²See generally Porcelain-On-Steel Cooking Ware from Taiwan, Views of the Commission Concerning Its Determination to Not Institute a Review of Investigation No. 731-TA-299, USITC Pub. 2117 (Aug. 1988) at 7-8 (citing Welded Carbon Steel Pipes and Tubes from Turkey, Commission Memorandum Opinion, in re Docket No. 1394; Request for review investigation under section 751(b) of the Tariff Act of 1930, 19 U.S.C. § 1675(b)). The Commission's views in Porcelain-On-Steel Cooking Ware reference the "original investigation" and "original proceeding" because at the time of those views (1988) the good cause requirement did not apply to Commission reviews of suspended investigations.

¹³*Id.* at 8.

¹⁴*Id.* at 7.

The Commission seeks comments on a request for a changed circumstances review upon receipt of a “properly filed and sufficient request.”¹⁵ The decision to undertake a review is “a threshold question . . . [which] may be made only when it reasonably appears that positive evidence adduced by the petitioner together with other evidence gathered by the Commission leads the ITC to believe that there are changed circumstances sufficient to warrant review.”¹⁶ The party requesting a changed circumstances review bears the burden of persuasion of showing that there are sufficient changed circumstances to warrant a review.¹⁷

SVC asserts that no five-year review will occur until 2007, due to the suspension of the investigation in 1996, the termination of that suspension agreement in 2002, and the entry into the second suspension agreement in 2002. SVC asserts that such a result is contrary to U.S. law and U.S. obligations under the World Trade Organization agreements. SVC does not, however, address the good cause requirement that applies to the requested review, nor does it allege any change in circumstances that have occurred since the entry into the suspension agreement in December of 2002. The entry into the suspension agreement does not itself constitute a changed circumstance. Given SVC’s failure to assert the existence of good cause or any change in circumstances, the Commission concludes that SVC has not met its burden in this request. For the same reasons, the Commission concludes that SVC’s request is not “sufficient” to warrant the issuance of a notice seeking comment on the request.

In light of the above, the Commission determines that institution of a review investigation under section 751(b) of the Act concerning the suspension agreement in effect suspending investigation No. 731-TA-747: Fresh Tomatoes from Mexico, is not warranted.

By order of the Commission.

Marilyn R. Abbott
Secretary to the Commission

Issued: March 25, 2003

¹⁵19 C.F.R. § 207.45(b).

¹⁶Avesta AB v. United States, 689 F. Supp 1173, 1181 (Ct. Int’l Trade 1988).

¹⁷19 U.S.C. § 1675(b)(1) & (3), Avesta, 689 F. Supp. at 1181.